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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 719

W. DANIEL PINKERTON AND WALTER G. PINKERTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 242–245) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 30, 1945 (R. 246), and a petition for rehearing was denied December 1, 1945 (R. 248). The petition for a writ of certiorari was filed January 5, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioners presented sixty-eight separate assignments of error (R. 218–235) in the circuit court of appeals, and the petition states that none of these is waived in this Court (Pet. 9). However, only one point is argued in the brief in support of the petition. This may be stated as follows:

The two petitioners were jointly indicted in ten counts charging substantive violations of provisions of the Internal Revenue Code relating to liquor and in one additional count charging conspiracy to violate those and other related provisions of the Code. The evidence showed that there was but one conspiracy and that the substantive offenses were committed in furtherance of that conspiracy. The trial court instructed the jury that each petitioner could be convicted of the substantive offenses if he was a party to the conspiracy at the time the offenses were committed. Did this render all eleven counts of the indictment in effect conspiracy counts charging various aims of a single conspiracy, thus making it illegal under *Braverman* v. *United States*, 317 U. S. 49, to sentence petitioners in excess of two years?

STATUTES INVOLVED

Section 2803 of the Internal Revenue Code (26 U. S. C. 2803) provides in pertinent part:

> (a) No person shall * * * possess * * * any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *
>
> * * * * * *
>
> (g) Any person who violates any provision of this section * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

Section 3321 of the Internal Revenue Code (26 U. S. C. 3321) provides in pertinent part:

> (a) Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one

> or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than 2 years, or both.

Section 332 of the Criminal Code (18 U. S. C. 550) provides:

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

STATEMENT

On April 17, 1945, the two petitioners, W. Daniel Pinkerton and Walter Pinkerton, were indicted in the District Court for the Northern District of Alabama in eleven counts charging violations of the Internal Revenue Code and conspiracy to violate certain provisions of the Code. Counts 1 and 10 (R. 2, 7–8) charged petitioners with unlawful possession of whiskey in unstamped containers on October 7, 1939, and May 29, 1940, respectively (26 U. S. C. 2803). Counts 2 to 9, inclusive (R. 3–7), charged that on various dates between October 7, 1939, and June 26, 1943, they had unlawfully removed, deposited, and concealed certain quantities of whiskey with intent to defraud the United States of the tax thereon (26 U. S. C. 3321). Count 11 (R. 8–13) charged petitioners with conspiring to violate Sections 2803, 2810, 2833, 2834, 3253, and 3321 of the Internal

Revenue Code (18 U. S. C. 88). A demurrer to all counts based on the statute of limitations was overruled (R. 13–15). Daniel Pinkerton's plea of former jeopardy was sustained as to counts 1, 2, and 4 (R. 25–26). After a jury trial, Daniel Pinkerton was found guilty on all counts except counts 1, 2, 4, and 7; Walter Pinkerton was found guilty on all counts except count 7 (R. 32). Walter Pinkerton was sentenced to imprisonment for 30 months and fined $500 under the substantive counts, and under the conspiracy count he was sentenced to two years' imprisonment to run concurrently with the 30 months' sentence (R. 32–35). Daniel Pinkerton was sentenced to 30 months' imprisonment and fined $1,000 under the substantive counts, and to imprisonment for two years and fined $500 under the conspiracy count, the latter prison sentence to run concurrently with the sentence of 30 months (R. 35–38).

The pertinent evidence for the Government supporting the various counts may be summarized as follows:[1]

Count 11.[2]—Petitioners are brothers. The farm on which they both live is owned by Daniel. Their

[1] We omit the evidence as to count 7, since petitioners were acquitted under it.

[2] In summarizing the evidence under this count charging a conspiracy, we refer only to the general evidence not relating to any particular substantive count. The evidence set out below supporting the substantive counts supports the conspiracy count as well.

separate homes are on the same side of the road and about 150 to 200 yards apart. Two well travelled paths ran between the two houses, one at the side of the road and one at the rear of the houses. (R. 55–56, 73, 91–93, 97.) There was evidence of frequent association between the two petitioners (R. 66, 74, 123–124). Investigators had found moonshine whiskey around Daniel's premises before January 15, 1939[3] (R. 50–72). Empty whiskey containers were frequently found in many places around the farm, some of which smelled of moonshine whiskey (R. 64–65, 74, 75, 76, 82, 93, 94, 120). Petitioners had often been arrested for violations of state and federal liquor laws, and in each instance one would make bond for the other (R. 125–131). On one occasion, when the investigators were searching Daniel's house, Walter appeared with a gun and threatened to kill one of them (R. 75, 78–79, 112, 114–115, 117–118, 121–122). On another occasion, an undercover agent drove up to Daniel's house and asked for whiskey. Walter came out and sold him a pint of tax-paid whiskey[4] and a half-pint of alcohol flavored with peach, on which no taxes had been paid, which he obtained from inside Daniel's house. Walter told the agent that the peach mixture was his own

[3] These offenses were barred by the six year statute of limitations. The evidence was admitted solely to show intent (R. 72).

[4] Daniel had a retail liquor dealer's license issued by the federal government (R. 157–158).

and that "he had a good sale on it." (R. 107–109.)

Counts 1, 2, and 4.[5]—On October 7, 1939, investigators caught Daniel with two pints of illicit whiskey on his person and found six more pints concealed in the bushes a short distance from his house. On December 7, 1940, they found three pints of illegal whiskey concealed in the wall of Daniel's house. (R. 73–74, 75, 79, 111, 112, 117, 118, 121.)

Counts 3 and 10.—On May 29, 1940, five investigators searched the vicinity of Walter's house. About 150 yards east of his house they found a "jacket can" buried in the ground which contained two and a half gallons of moonshine whiskey. A well-defined trail led from the house to the buried can. South of the house at the edge of the yard they found a gallon and two pints of moonshine whiskey in buried containers. None of the containers were stamped. Around the premises they found other buried containers which at one time had whiskey in them. (R. 74, 79–80, 82–83, 90–91, 111–112, 116, 117.)

Count 5.—On October 11, 1941, in a bedroom in Walter's house, the investigators found two gallon jugs full of moonshine whiskey on which

[5] These are the counts which were dismissed as to Daniel, since he had previously been convicted for the offenses and had served six months in prison (R. 26, 132).

no taxes had been paid. Walter was in the house when the investigators arrived. (R. 89–90, 114, 116, 118–119, 121.)

Count 6.—In the autumn of 1942 the investigators found a gallon of illegal whiskey concealed in a swamp across the road from Walter's house. It had been raining and identical footprints were observed which led from the front door of Walter's house to the concealed container and back to the house again. (R. 91, 95, 97.)

Count 8.—On February 5, 1943, Walter and Cornelius Porter drove to the next county, where Walter bought nineteen gallons of moonshine whiskey. On the way back they were pursued by officers who had recognized Walter as the driver of the car. They abandoned both car and whiskey, which were taken by the officers. (R. 100–103, 119, 122, 137.) This car, a 1936 Ford, had stood in Daniel Pinkerton's yard for about six weeks in the fall of 1942, undergoing repairs after having been wrecked (R. 95, 97, 98, 99, 119). After it had been repaired, it was driven by Walter until it was taken by the officers (R. 95, 96, 99, 119). Before he began driving the Ford, Walter had been using a Packard; the Packard ran out of tires and was parked in Daniel's yard while Walter used the Ford (R. 76–77, 95–96, 97, 118, 119).

Count 9.—On June 26, 1943, four men drove into Walter's yard. Two of them walked to the

back of the house with Walter. They returned to the car, drove off, and soon a pint of moonshine whiskey was produced. No whiskey had been seen in the car before it entered Walter's yard. Officers saw the car leaving Walter's yard, pursued it, and took the whiskey. (R. 83–87, 96, 97–98.)

In the court's instructions the jury were told, *inter alia*, that before petitioners could be convicted on any of the substantive counts numbered 2 to 9, inclusive, the jury would have to be satisfied beyond a reasonable doubt that they had removed, concealed, or deposited the particular quantity of liquor stated in the count with intent to defraud the United States of the tax thereon; that under substantive counts 1 and 10 the Government would have to show that petitioners unlawfully and knowingly possessed the stated amount of liquor in unstamped containers; and that the jury could convict one or both of the petitioners on any of these counts and acquit one or both. The court also instructed the jury that if they were satisfied that a conspiracy existed between the two petitioners at the time the substantive offenses were committed, and if they were also satisfied that the substantive offenses were the objects of the conspiracy or were committed in furtherance of the conspiracy, they would have a right to convict each of the petitioners of all of the sub-

stantive offenses that had actually been committed.[6] (R. 189–192.)

On appeal, the circuit court of appeals held that counts 1 and 10, which charged possession of whiskey in unstamped containers, were barred by the three year statute of limitations[7] and that the demurrer should have been upheld as to them (R. 243). As to the remaining substantive counts, the court apparently thought that there was sufficient evidence that each of the specified offenses had been committed by one or the other of the two petitioners, although this is not expressly stated in the opinion; and it held that there was sufficient evidence that the two petitioners had actually entered into a conspiracy to commit the substantive

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[6] In giving these instructions, the court was careful to point out that Daniel could not be found guilty on counts 1, 2, and 4, because he had previously been convicted of the offenses charged in those counts (R. 190, 191; see pp. 5, 7, *supra*).

[7] Section 3748 of the Internal Revenue Code (26 U. S. C. 3748) provides in pertinent part:

> "(a) No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, * * *"

offenses and that the act of one conspirator in furtherance of the common plan was the act of all. (R. 244.) Finally, it was held that the judgments should be affirmed, despite the ruling as to counts 1 and 10, since the punishment imposed for the substantive offenses was less than was authorized under any one of the substantive counts (R. 245).

DISCUSSION

Petitioners do not challenge the two year sentences on the conspiracy count. Their sole objection is to the 30 months' concurrent sentences on the substantive counts. The argument begins with an assertion that the evidence shows petitioners are not guilty under the substantive counts remaining in the case (Pet. 10). (Since it is indubitable that all these substantive offenses were committed by either one or the other petitioner, we assume the meaning of this assertion to be that there is no evidence that any of them were committed by *both* petitioners.) The argument then proceeds as follows: The only theory upon which the convictions for the substantive offenses can be upheld is that petitioners were united in a conspiracy at the time the substantive offenses were committed; consequently, on all counts, including the conspiracy count, conviction was had because there was a conspiracy, and all counts thus became in effect separate conspiracy counts;

since the Government does not attempt to establish more than one conspiracy, the various counts set out the various objects of a single conspiracy; under the rule of *Braverman* v. *United States*, 317 U. S. 49, there can be only one two year sentence when the evidence reveals a single conspiracy, even though the single conspiracy may have had many criminal objects (Pet. 10–13). The conclusion is that the 30 month sentences were excessive (Pet. 14).

In the *Braverman* case, the several counts of the indictment each charged a conspiracy, and the evidence revealed that there was a single conspiracy with several distinct criminal objects; but there was no issue in that case as to the accomplishment of the objects of the conspiracy through commission of the substantive crimes. Obviously, this case does not present a parallel situation, for here petitioners were charged with commission of the substantive offenses, and the proof is clear that each of those offenses was actually committed by either one or the other of the two petitioners. We are unable to follow the logic by which petitioners would merge their guilt of the substantive offenses back into the original crime of conspiracy, for it is settled that a conspiracy is an offense separate and distinct from any substantive offenses which are its object and that both the conspiracy and substantive offenses, when accomplished, are separately punishable. *Braverman* v.

United States, 317 U. S. 49, 54; *United States* v. *Rabinowich,* 238 U. S. 78, 85, and cases cited. It is uncontested that petitioners had conspired to commit the substantive offenses with which they were charged[8] and the court below held them jointly guilty of each substantive offense under the commonly accepted rule that a conspirator "is bound by the acts of his fellow conspirators done within the scope of the conspiracy," regardless of whether he participates in the substantive offense. *Kann* v. *United States,* 140 F. 2d 380, 382 (C. C. A. 4), reversed on other grounds, 323 U. S. 88.[9]

However, if guilt of an individual conspirator for an objective offense cannot be sustained upon

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[8] The conspiracy count charged, among other things, that petitioners had agreed to possess whiskey in unstamped containers and to conceal whiskey with intent to defraud the United States of the tax (R. 8–9). The jury found them guilty on this count, and they do not complain of the sufficiency of the evidence as to it.

[9] The *Kann* case, and *Blue* v. *United States,* 138 F. 2d 351, 359 (C. C. A. 6), certiorari denied, 322 U. S. 736–737; *Baker* v. *United States,* 115 F. 2d 533, 540 (C. C. A. 8), certiorari denied, 312 U. S. 692; and *Tincher* v. *United States,* 11 F. 2d 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664, involved prosecutions for use of the mails in furtherance of a joint scheme to defraud and those decisions assimilate the rule in conspiracy cases. *Johnson* v. *United States,* 62 F. 2d 32, 34 (C. C. A. 9), which also applied the rule, was a prosecution, like the instant one, for conspiracy to violate and substantive violations of the internal revenue laws relating to liquor in which some of the co-conspirators had no part whatever in the substantive offense.

the basis alone of the agency principle applied in the *Kann* and other cases cited, Daniel Pinkerton's case presents a further problem, since the only substantive offenses in which he was the principal actor were those charged in counts 1, 2, and 4, which were dismissed as to him (see pp. 5, 7, *supra*). It might be argued, as was held in *United States* v. *Sall*, 116 F. 2d 745, 747 (C. C. A. 3), that "it was not sufficient merely to prove that he was a member of the conspiracy. * * * and that in the course of that conspiracy those particular [substantive] crimes were committed by other conspirators," and that "it is still necessary to prove that the defendant, even though he had joined the conspiracy, had also joined * * * in the concealment of alcohol which constituted the substantive offense with which he is charged." This is the only decision we have found which casts doubt upon the validity of the rule of criminal liability of a co-conspirator for substantive offenses committed by a fellow conspirator in furtherance of the conspiracy. But even conceding the correctness of the *Sall* decision, there was clear evidence that Daniel was an aider and abetter [10] in those offenses committed on the farm property (counts 3, 5, and 9, *supra*, pp. 7–8, 8–9) in

[10] It was, of course, unnecessary that he be indicted as an aider and abetter. 18 U. S. C. 550; *Melling* v. *United States*, 25 F. 2d 92 (C. C. A. 7); *O'Brien* v. *United States*, 25 F. 2d 90, 91 (C. C. A. 7).

which Walter Pinkerton was the principal actor.[11] Daniel was the owner of the farm, the two brothers were closely associated in bootlegging activities, and Daniel obviously knew what Walter was doing (R. 127–131). "* * * one cannot knowingly permit his premises to be used for an unlawful purpose, thereby contributing to the success of the enterprise in a very substantial way, without becoming a party thereto, unless, within a reasonable time after becoming aware of the unlawful use, dependent upon the circumstances of the individual case, he takes steps reasonably calculated to terminate that unlawful use." *Cardinal* v. *United States*, 50 F. 2d 166, 170 (C. C. A. 8). However, in candor, it must be pointed out that the substantive counts were neither submitted to the jury nor the convictions sustained below on the aider and abetter theory, but upon the principle of liability of a conspirator for substantive offenses committed by a co-conspirator in carrying out the unlawful enterprise.

The problem as to Daniel's case does not exist in Walter's, for, as the evidence shows, he was clearly implicated as the principal actor in all of the substantive offenses as to which his conviction

[11] Since Daniel's general sentence under the substantive counts is no more than might have been imposed under any one of them, it is sufficient if his conviction on one of those counts is good. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105.

was upheld, except those charged in counts 2 and 4 (see pp. 7–9, *supra*). Hence, whatever may be the disposition which the Court determines upon in Daniel's case, we respectfully submit that the petition should clearly be denied as to Walter.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

W. MARVIN SMITH,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
JOSEPH M. HOWARD,
Attorneys.

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